

ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1226

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RIVERDALE MILLS CORPORATION,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition for Review of a Final
Order of the Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Respondent Secretary certifies as follows:

A. Parties

All parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioner Riverdale Mills Corporation.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioner Riverdale Mills Corporation.

C. Related Cases

This case has not previously been before this or any other Court. The Secretary is not aware of any related cases currently pending in this Court or any other Court.

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GLOSSARY

Administrative Law Judge	ALJ
Compliance Officer	CO
Industrial Hygienist	IH
Lockout/Tagout	LOTO
Occupational Safety and Health Act of 1970	OSH Act
Occupational Safety and Health Administration	OSHA
Safety Data Sheets	SDS

STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA) enforcement proceeding before the Occupational Safety and Health Review Commission (Commission). The Commission had jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. § 659(c).¹ The Commission's August 22, 2022 final order affirmed three OSHA citation items against Riverdale Mills Corporation (Riverdale). Riverdale filed its petition for review of the Commission's final order with this Court on August 29, 2022, within the sixty-day period prescribed by the OSH Act. 29 U.S.C. § 660(a). This Court has jurisdiction over this appeal pursuant to section 11(a) of the Act, 29 U.S.C. § 660(a). Venue is appropriate because the OSH Act authorizes employers to obtain review of Commission final orders in the Court of Appeals for the District of Columbia Circuit. *Id.*

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Commission administrative law judge (ALJ) correctly determined that Riverdale violated 29 C.F.R. § 1910.147(c)(6)(i), the provision of OSHA's lockout/tagout (LOTO) standard that requires employers to annually inspect employees performing LOTO to ensure their proficiency in the procedures

¹ Pursuant to D.C. Cir. R. 28(a)(5) all pertinent statutes and regulations are set forth in an addendum bound separately.

used, where, on April 26, 2019, Riverdale's maintenance supervisor performed LOTO on a spindle machine presenting electrical and pneumatic hazards without ever having received a periodic inspection.

2. Whether the ALJ correctly determined that Riverdale violated 29 C.F.R. § 1910.1200(h)(1), the provision of OSHA's hazard communication standard that requires employers to provide training on hazardous chemicals, where a coating line machine operator disclosed that he regularly worked with hazardous chemicals but had not been trained in the health hazards associated with those chemicals.

3. Whether the ALJ correctly held that Riverdale violated 29 C.F.R. § 1910.1200(g)(11), the provision of OSHA's hazard communication standard that requires employers to provide safety data sheets to OSHA within fifteen days, where Riverdale waited nearly ninety days before partially responding to OSHA's safety data sheet request.

STATEMENT OF THE CASE

I. Procedural History

This case stems from two 2019 OSHA inspections of a Riverdale plant in Northbridge, Massachusetts. *See* Vol. 12, Doc. 2; Vol. 13, Doc. 18. The first followed a degloving injury that occurred when an employee's arm caught in moving machinery. Vol. 2, Tr. 469; Vol. 3, Tr. 696, 700; Vol. 4, Tr. 885. As a result, OSHA issued a serious citation (containing several items) against Riverdale

on September 26, 2019. Vol. 12, Doc. 2. The second responded to an employee complaint about coating and galvanizing chemicals. Vol. 5, Tr. 1049-1050; Vol. 10, R-47. OSHA subsequently issued an additional serious citation (containing several items) and one other-than-serious citation against Riverdale on December 13, 2019. Vol. 13, Doc. 18.

Riverdale timely contested the citations and a Commission ALJ consolidated the proceedings. Vol. 12, Doc. 3; Vol 13, Doc, 19; Vol. 14, Doc. 26. A hearing on the merits took place before ALJ Calhoun from June 14 through June 17, 2021, and August 16 through August 19, 2021. Vols. 1-8. On July 1, 2022, after supplemental briefing, ALJ Calhoun issued a decision affirming the three citation items at issue in this appeal (the violations of 29 C.F.R. §§ 1910.147(c)(6)(i), 1910.1200(h)(1), and 1910.1200(g)(11)).² Vol. 22, Doc. 149 at 40. Riverdale filed a petition for discretionary review of the ALJ's decision with the Commission on August 4, 2022, which the Commission did not grant. Vol. 22, Docs. 151, 153.

The ALJ decision therefore became a Commission final order by operation of law on August 22, 2022. Vol. 22, Doc. 153; 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90(f). Riverdale filed a timely petition for review of the Commission's

² OSHA originally cited Riverdale for fifteen violations of OSHA standards. *See* Vol. 12, Doc. 2; Vol. 13, Doc. 18. OSHA withdrew six of these violations during the ALJ proceedings. Vol. 12, Doc. 7; Vol. 17, Doc. 68; Vol. 19, Doc. 83). The ALJ vacated six other violations in her decision. Vol. 22, Doc. 149 at 40. The Secretary is not appealing that decision.

final order with this Court on August 29, 2022. *See* ECF Doc. 1961379, Docketing Order.

II. Statutory and Regulatory Framework

Congress enacted the OSH Act in 1970 “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b). To advance that purpose, Congress divided regulatory, enforcement, and adjudicative functions between two independent administrative actors. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 151 (1991). Specifically, Congress gave the Secretary, acting through OSHA,³ regulatory, policymaking, and enforcement responsibilities, and conferred on the Commission, an independent body that is not part of the U.S. Department of Labor, purely adjudicative responsibilities. *Id.* at 147, 152-54.

OSHA’s regulatory responsibilities include promulgating and enforcing “mandatory occupational safety and health standards,” *see* 29 U.S.C. §§ 651(b)(3), 654, 655, 658, 659, and OSHA enforces its standards by conducting inspections of workplaces and issuing citations for discovered violations. *Id.* §§ 657-659. OSHA citations “describe with particularity the nature of the violation,” *Id.* § 658(a),

³ The Secretary has delegated his responsibilities under the Act to an Assistant Secretary who heads OSHA. Dep’t of Labor, Office of Sec’y, *Delegation of Auth. & Assignment of Responsibility to the Assistant Sec’y for Occupational Safety & Health*, Secretary’s Order 8-2020, 85 Fed. Reg. 58393 (Sept. 18, 2020). The terms “Secretary” and “OSHA” are used interchangeably in this brief.

require the employer to abate the violation, and, where appropriate, assess a civil penalty. *Id.* §§ 658-659, 666. A violation of the Act may be classified as “serious,” “other-than-serious,” “willful,” or “repeated.” *Id.* § 666.

When a cited employer contests a citation, a Commission appointed ALJ adjudicates the dispute, after which a party that is dissatisfied with the ALJ’s decision may petition the Commission for discretionary review. *Id.* §§ 659(c), 661(a), (j); 29 C.F.R. § 2200.91(a). Where the Commission declines review, the ALJ’s decision becomes the final order of the Commission thirty days after the docketing of the ALJ’s report. 29 U.S.C. § 661(j); 29 C.F.R. § 220.90(f). Commission final orders are reviewable in the courts of appeals. 29 U.S.C. § 660(a)-(b).

The citations at issue in this appeal concern violations of OSHA’s lockout/tagout (LOTO) and hazard communication standards, described in detail below.

A. OSHA’s Lockout/Tagout Standard

The LOTO standard, 29 C.F.R. § 1910.147, contains OSHA’s requirements to protect employees from the “unexpected energization, start-up or release of stored energy” in machines and equipment.” § 1910.147(a)(3)(i). The standard requires that employers:

[E]stablish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any

employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative.

§ 1910.147(c)(1). For each machine or equipment to which this section applies, an employer must develop, document, and use procedures for the control of potentially hazardous energy when employees engage in service or maintenance of the machines or equipment. § 1910.147(c)(4)(i).

Employers are required to “conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirements of this standard are being followed.” § 1910.147(c)(6)(i). The periodic inspection must be performed by an authorized employee other than the employee applying the energy control procedure being inspected, § 1910.147(c)(6)(i)(A), and must include a review between the inspector and the authorized employee of that employee’s responsibilities under the energy control procedure being inspected, § 1910.147(c)(6)(i)(C)-(D). Employers must also certify that they have performed periodic inspections of authorized employees. § 1910.147(c)(6)(ii). The certification “shall identify the machine or equipment on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection.” *Id.* The standard defines “authorized employee” as “[a] person who

locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment.” § 1910.147(b).

B. OSHA’s Hazard Communication Standard

The hazard communication standard, § 1910.1200, contains OSHA’s requirements for classifying and conveying information about hazardous chemicals. Employers must “provide information to their employees about the hazardous chemicals to which they are exposed.” § 1910.1200(b)(1). This is accomplished through “comprehensive hazard communications programs, which are to include container labeling and other forms of warning, safety data sheets and employee training.” § 1910.1200(a)(1). The standard applies to “any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.” § 1910.1200(b)(2).

The hazard communication standard delineates when employee training should occur and the information that must be covered. The standard requires that employers:

[P]rovide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

§ 1910.1200(h)(1). At a minimum, the training that employees receive must cover: (i) means of detecting the presence of chemical hazards in the work area; (ii) the hazards associated with such chemicals; (iii) the measures available to protect against those hazards; and (iv) the details of the hazard communication program (including how to obtain safety data sheets). § 1910.1200(h)(3).

Employers must also make safety data sheets readily available to OSHA upon request. § 1910.1200(g)(11). The standard requires that when access to a safety data sheet or other record is requested:

[T]he employer shall assure that access is provided in a reasonable time, place, and manner. If the employer cannot reasonably provide access to the record within fifteen (15) working days, the employer shall within the fifteen (15) working days apprise the [requester] of the reason for the delay and the earliest date when the record can be made available.

§ 1910.1020(e)(1)(i).

STATEMENT OF FACTS

I. Riverdale's Coating Line Operation and Safety Policies

Riverdale manufactures welded wire mesh products at its facility in Northbridge, Massachusetts. Vol. 19, Doc. 84, Attach. C, No. 3. The manufacturing process includes the coating line, where a PVC coating is adhered to the mesh. Vol. 1, Tr. 78-79. To receive the coating, rotating, cylindrical tubes (rollers) propel the mesh through a series of wash tanks, ovens, vats, and chambers. Vol. 1, Tr. 84-87. Once coated and cooled, the mesh travels through the main

drive and then to the spindle area, where spindle operators roll and cut the material to its desired length. Vol. 1, Tr. 87-88, 116.

Riverdale employees did not have a consistent way of referring to the three spindles in the spindle area. The spindle receiving mesh directly off the main drive was referred to as “Big Spindle,” “Spindle 1,” or “C-spindle” whereas the spindles set apart from the coating line rollers were referred to as the “Small Spindles” or “Spindle 2” and “Spindle 3.” *See* Vol. 1, Tr. 116-117; Vol. 4, Tr. 838-39; Vol. 9, C-4 at 5a (annotated at trial), C-40 (video still).

Riverdale has a written LOTO program. Vol. 10, R-57. The program applies to all electrical and pneumatic energy sources and advises authorized employees to follow the relevant hazardous energy control procedures when performing LOTO. Vol. 4, Tr. 862; Vol. 10, R-57 at 3-4, 6. The program includes a LOTO log where employees must record the date and time of any LOTO performed. Vol. 4, Tr. 834-36; Vol. 10, R-57 at 4, 15. The log does not record what specific service or maintenance work occurred; however, an entry on the log confirms that a lockout event occurred on the equipment identified. Vol. 4, Tr. 838, 859-60; Vol. 10, R-57 at 4. Riverdale’s LOTO program also requires that each authorized employee “undergo at the minimum an annual inspection of their understanding of [LOTO] procedures.” Vol. 10, R-57 at 13. Each inspection

should be documented on a LOTO Practical Demonstration Checklist identifying which tasks an employee has passed or failed. *Id.* at 13, 16.

Riverdale also has a written Hazard Communication Program that addresses employee training and information. Vol. 10, R-80 at 2. Required information and training topics include, among others, “operations in [employees’] work area where hazardous chemicals are present” and the “physical and health hazards of the chemicals in [employees’] work area.” *Id.* The company’s employee handbook specifies that hazard communication training will be provided to newly hired employees one-on-one.⁴ Vol. 9, C-9 at 56.

II. OSHA’s First Inspection and Citation

On April 3, 2019, a Riverdale spindle operator was seriously injured on the coating line. Vol. 3, Tr. 677, 700-02. While at the spindle, the operator observed the mesh out of alignment as it entered the main drive roll. Vol. 3, Tr. 695. Using his hand, the spindle operator attempted to manually correct the issue, as he had observed others do, and pulled on the mesh near the main drive rollers. Vol. 3, Tr. 696, 699-700. The rollers caught his right arm and hand, breaking bones and stripping the skin from his forearm to wrist. Vol. 2, Tr. 469; Vol. 3, Tr. 696, 700-01.

⁴ At trial, Riverdale’s plant safety manager, David Stevens, testified that he provides this training to employees through a training film and five-page training document. Vol. 7, Tr. 1531-32.

OSHA received notice of the accident and opened a safety inspection. Vol. 4, Tr. 885. OSHA visited the facility and photographed the coating line, including the spindle area. Vol. 4, Tr. 991; Vol. 9, C-4 at 5. OSHA requested numerous documents. These included “all energy control procedures” for coating line equipment and documents identifying tasks requiring LOTO. Vol. 9, C-14 at 2, C-16 at 2. In response, Riverdale provided several work order forms, including work orders for Spindle 1 and Spindle 3, and one LOTO procedure for the spindle area. Vol. 4, Tr. 1015; Vol. 9, C-17 at 35, 38, 42, C-20 at 20-23. OSHA also reviewed Riverdale’s LOTO logs. Vol. 4, Tr. 1009.

The LOTO logs included an entry showing that maintenance supervisor⁵ Tom Borden performed LOTO on coating line spindle (“C-spindle”) on April 26, 2019. Vol. 4, Tr. 835-36, 838-40; Vol. 9, C-16 at 4. At Riverdale, maintenance mechanics and supervisors were authorized employees responsible for LOTO. Vol. 4, Tr. 842, 1184-85; Vol. 9, C-105 at 31-33. Borden testified that while in maintenance, he regularly performed service on equipment and preventative maintenance, including on the coating line, where the spindles are located. Vol. 4, Tr. 831, 834, 839, 863. When performing maintenance work, Borden followed the

⁵ Borden worked for Riverdale over two periods: from the 1990s through mid-2000s and from 2016 to December 2019. Vol. 4, Tr. 828-89. Borden began his second period of employment as a maintenance mechanic. *Id.* He advanced to maintenance supervisor around October 2018. *Id.*

unique LOTO procedure for the coating line spindle, as required by Riverdale's LOTO program. Vol. 4, Tr. 840-42. The procedure informed Borden of the spindle's electrical and pneumatic energy sources and hazards, including the "quick disconnect for the couplings for the compressed air." Vol. 4, Tr. 842, *see also* Vol. 4, Tr. 1014.

Borden testified that during his employment, Riverdale did not conduct a single periodic inspection of his LOTO tasks. Vol. 4, Tr. 843, 864. During the investigation, OSHA requested all completed periodic inspection records from April 26, 2016, to April 26, 2019. Vol. 4, Tr. 937-38; Vol. 9, C-14 at 2. Riverdale provided OSHA with the blank Practical Lockout Tagout Demonstration Checklist contained in its LOTO program. Vol. 4, Tr. 940-41; Vol. 9, C-16 at 26. However, Riverdale did not produce any completed versions of this form. Vol. 4, Tr. 938, 940-41.

OSHA issued the first citation on September 26, 2019. Vol. 12, Doc. 2 at 7. Citation 1, Item 2, alleged that Riverdale had engaged in a serious violation of 29 C.F.R. § 1910.147(c)(6)(i) because the company "did not conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirement of this standard were being followed." Vol. 12, Doc. 2 at 7. The alleged violation description stated that "at the Coating Line ...

On 4/26/2019 the employer had not conducted a periodic inspection of Energy Control Procedure RMC-022 for the Big Spindle since 4/26/2016.” *Id.*

III. OSHA’s Second Inspection and Citation

OSHA opened its second inspection of Riverdale on June 27, 2019, in response to an employee complaint received mid-April 2019. Vol. 5, Tr. 1049-50; Vol. 7, Tr. 1578-79. The complaint alleged in part that employees “may be exposed to poor indoor air quality from powder coating and galvanizing chemicals.” Vol. 10, R-47. OSHA initially responded to the complaint non-formally and opened the inspection after Riverdale failed to satisfactorily respond. Vol. 5, Tr. 1049-50; Vol. 7, Tr. 1579.

A. OSHA’s Investigation of Riverdale’s Hazard Communication Training

While conducting her inspection at Riverdale, Industrial Hygienist (IH) Hart interviewed Luis Trinidad, a coating line machine operator who had been employed for two months. Vol. 5, Tr. 1073; Vol. 9, C-27. IH Hart recorded Trinidad’s statements in writing using a standard OSHA form. Vol. 5, Tr. 1072-73; Vol. 9, C-27. When the interview concluded, Trinidad reviewed the form for accuracy and signed it. Vol. 5, Tr. 1072, 1074. Although OSHA employee interviews are generally confidential, Riverdale General Counsel Cyril Means requested to attend Trinidad’s interview. Vol. 5, Tr. 1070-72, 1077-78. Trinidad consented, and Means was present for the entire interview. *Id.*

Trinidad's work duties included checking the temperature and pH of four machine compartments containing water and "soap." Vol. 5, Tr. 1080-81; Vol. 9, C-27 at 1; *see also* Vol. 1, Tr. 215. Trinidad explained that he sometimes had to add "soap" to the compartments. Vol. 5, Tr. 1080-81; Vol. 9, C-27 at 2. During this task, Trinidad would wear gloves and a dust mask. Vol. 9, C-27 at 2. If "soap" got on Trinidad's skin, he would wash it off. *Id.* Trinidad did not know what was in the "soap" but stated that "[i]f I got soap on me, it's going to eat my skin ... soap literally will eat your flesh."⁶ Vol. 9, C-27 at 1; *see also* Vol. 5, Tr. 1079. Trinidad contrasted "soap" with PVC, another chemical he used, and which he described as "harmless." Vol. 9, C-27 at 1. At trial, IH Hart confirmed that the "soap" referenced by Trinidad is a term for sodium hydroxide, a corrosive chemical that can damage skin, eyes, and other body parts. Vol. 5, Tr. 1078-79. IH Hart also clarified that "PVC isn't necessarily harmless" because it can be carcinogenic. Vol. 5, Tr. 1081.

Trinidad informed IH Hart that he had not yet received training about chemicals. Vol. 5, Tr. 1080; Vol. 9, C-27 at 1. Trinidad's two-hour, new hire training covered forklifts and personal protective equipment such as steel toed

⁶ At trial, shift supervisor Brian Johnson and former production lead Adam Minter confirmed that "soap" will burn an individual's skin upon contact. Vol. 3, Tr. 519, 605-06; Vol. 6, Tr. 1323, 1372.

footwear.⁷ Vol. 9, C-27 at 1. The training included a video but there was “nothing in [the] video about chemicals.” *Id.* Trinidad also informed IH Hart that he had a safety data sheet for “soap.” *Id.* However, the document he produced, through Means, was not a safety data sheet, but instructions for making a product with “soap.” Vol. 5, Tr. 1081-82, Tr. 1082-83 (under seal); Vol. 11, C-28 (under seal).

Riverdale claimed that it documented Trinidad’s training through a Safety Training Checklist. Vol. 10, at R-106. This Safety Training Checklist notes that Trinidad completed “Right to Know/Hazard Communication – (Location of safety data sheets and other reference material)” on May 16, 2019. *Id.* Trinidad also took a Basic Employee Safety Responsibilities Test which contained two questions relating to hazard communication: one concerning material safety data sheets and one concerning labeling containers of chemicals. Vol. 10, R-107 at 1. Neither the Safety Training Checklist nor the Basic Employee Safety Responsibilities Test address “soap,” PVC, or associated hazards. *See* Vol. 10, R-106, R-107.

Although OSHA requested Riverdale’s hazard communication training, Vol. 9, C-26 at 1, Riverdale did not provide OSHA with either the training film or the

⁷ In addition to covering personal protective equipment during new hire training, shift supervisors conduct daily walk-throughs of the facility to ensure that workers are wearing proper equipment, including safety gloves and glasses. Vol. 6, Tr. 1326.

five-page document that plant safety manager Stevens claimed to provide employees. Vol. 7, Tr. 1531-32.

On December 13, 2019, OSHA issued the second citation. Vol. 13, Doc. 18. Citation 1, Item 3, alleged that Riverdale had engaged in a serious violation of 29 C.F.R. § 1910.1200(h)(1) because “employees were not provided effective information and training on hazardous chemicals in their work area at the time of their initial assignment...” *Id.* Specifically, “hazardous chemicals were used in the coating line work area, such as ‘soap,’ fluid bed chemicals, washer chemicals, and cooling chemicals, where an employee worked without first receiving effective information and training on such chemicals at the time of the initial assignment...” *Id.*

B. OSHA’s Requests for Safety Data Sheets

At the health inspection’s opening conference, IH Hart provided Riverdale owner Jim Knott and General Counsel Means a written document request. Vol. 9, C-26 at 1. This included annotated requests for safety data sheets and air sampling data. *See id.* IH Hart identified the air sampling data for the “area of complaint.” *Id.* For the safety data sheets, IH Hart added “any not already provided,” thinking that RMC may have already given safety data sheets to the safety inspector. Vol. 5, Tr. 1058; Vol. 9, C-26 at 1. IH Hart provided her business card, which included contact information where RMC could send the documents. Vol. 5, Tr. 1059.

Neither Knott nor Means expressed objection or confusion over IH Hart's request. Vol. 5, Tr. 1058, 1125.

IH Hart then conducted a supervised walk-around of the facility with Means, Knott, and Stevens. Vol. 5, Tr. 1059. IH Hart toured both the galvanizing and coating lines. Vol. 5, Tr. 1063 (under seal). At each line, IH Hart and Knott discussed the process and specific chemicals used, including Chemicals 3 and 5⁸ Vol. 5, Tr. 1063-64, 1065-66 (under seal). IH Hart also took a photograph of the Chemical 3 container label. Vol. 5, Tr. 1064 (under seal); Vol. 9, C-26 at 2.

Riverdale did not produce any safety data sheets between IH Hart's June 27, 2019 request and September 24, 2019, after IH Hart reiterated her request at the investigation's closing conference.⁹ Vol. 5, Tr. 1088-89; Vol. 11, C-31 at 1 (under seal). The safety data sheets that Riverdale provided included those for Chemicals 4, 5, and 6, which the proposed citation identified as examples of hazardous chemicals. Vol. 5, Tr. 1091-94 (under seal); Vol. 11, C-31 at 2-8, 61-73, 88-92 (under seal). Even though Riverdale did not state as such to OSHA, additional

⁸ Riverdale has asserted that certain chemicals are proprietary information; accordingly, the Secretary has used a Chemical Key throughout these proceedings when referencing these chemicals. Vol. 11, C-34 (under seal).

⁹ IH Hart made an interim request for safety data sheets via e-mail in August 2019. Vol. 5, Tr. 1110-12. Although IH Hart received a receipt stating her e-mail delivery was complete, the user of the Riverdale e-mail address had passed away and it was allegedly not viewed. *Id.*; Pet'r's Br. at 22.

safety data sheets for Chemicals 2 and 3 remained outstanding through the issuance of the citation on December 13, 2019. Vol. 5, Tr. 1094 (under seal); *see also* Vol. 11, C-31 (under seal).

Citation 2, Item 1, alleged that Riverdale committed an other-than-serious violation of 29 C.F.R. § 1910.1200(g)(11) when it did not make safety data sheets readily available. Vol. 13, Doc. 18 at 9. The violation alleged that the missing safety data sheets were “for the hazardous materials used on the galvanizing and coating lines, such as, but not limited to, Chemical 4, Chemical 5, and Chemical 6 identified on the chemical key.” *Id.*

IV. The ALJ Decision

The ALJ affirmed the violations that are at issue on appeal: the LOTO standard under § 1910.147(c)(6)(i) and the two provisions of the hazard communication standard under §§ 1910.1200(h)(1), 1910.1200(g)(11). Vol. 22, Doc. 149 at 40.

The ALJ concluded that Riverdale committed a serious violation of § 1910.147(c)(6)(i) by failing to conduct periodic inspections of energy control procedures. *Id.* at 7-13. The ALJ found that the facility’s maintenance supervisor was an authorized employee who performed LOTO on April 26, 2019, despite having never received a periodic inspection. *Id.* at 10-12. Riverdale could not rebut the Secretary’s case because it did not produce periodic inspection

certificates, which it was required to maintain under both the LOTO standard, § 1910.147(c)(6)(ii), and Riverdale's written LOTO program. *Id.* The ALJ also found no merit to Riverdale's argument that the violation description misidentified the spindle on which LOTO was applied. *Id.* at 10. It was sufficient that the maintenance supervisor "applied lockout/tagout to a spindle," *Id.*, and "had not been the subject of a periodic inspection for [LOTO] proficiency for *any* energy control procedures," *Id.* (emphasis in original). The ALJ found that the maintenance supervisor had access to the violative condition because he had "applied LOTO to a spindle on the coating line on April 26, 2019" and the employer had not ensured the maintenance supervisor's understanding of the relevant procedures to protect against associated electric and pneumatic hazards. *Id.* at 12-13.

Riverdale also committed a serious violation of § 1910.1200(h)(1) because it did not provide effective information and training to a machine operator working with hazardous chemicals. *Id.* at 29-34. The ALJ credited the machine operator's statement that he did not receive hazard communication safety training and inferred from Riverdale's failure to produce purported training documents that training materials did not address the required training. *Id.* at 33, 33 n. 20 (*citing N. Landing Line Constr. Co.*, 19 BNA 1465, 2001 WL 826759 at *9 (No. 96-721, 2001); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 403 n. 4 (4th Cir.

1979)). Riverdale’s own policies required it to provide one-on-one training to new hires, and therefore the company knew that the machine operator had not been adequately trained. *Id.* at 33-34.

Riverdale committed an other-than-serious violation of § 1910.1200(g)(11) because it did not provide, upon request, safety data sheets for hazardous materials used on the galvanizing and coating lines. *Id.* at 34-39. The ALJ gave weight to IH Hart’s testimony that she requested these specific safety data sheets from Means, Riverdale’s corporate counsel, because Means was present as she testified but did not take the witness stand to dispute her statement. *Id.* at 36-37. Under the cited standard, there was “an affirmative obligation on the employer to take action in response to the request for access to records.” *Id.* at 38. Riverdale failed to satisfy this obligation despite knowledge of the request. *Id.*

SUMMARY OF THE ARGUMENT

Substantial evidence in the record supports the ALJ’s decision affirming the three violations at issue here. With respect to the violation of § 1910.147(c)(6)(i), record evidence establishes that Riverdale failed to conduct periodic inspections of its LOTO procedures. On April 26, 2019, Riverdale’s maintenance supervisor performed LOTO on “C-spindle,” which presented electrical and pneumatic hazards. Riverdale never provided a periodic inspection to the maintenance

supervisor. As a result, he was at risk of performing improper LOTO procedures, which could have resulted in the release of hazardous energy.

The record evidence likewise demonstrates that Riverdale violated § 1910.1200(h)(1) by failing to train its employees on hazardous chemicals. Specifically, Riverdale did not train a coating line machine operator about the physical health hazards associated with known chemicals in his work area. As a result, the machine operator could not explain why he experienced burns when working with a product and mistakenly identified a carcinogen as harmless.

Additionally, the ALJ correctly found that Riverdale violated § 1910.1200(g)(11) because the company failed to respond to OSHA's request for safety data sheets in the time, place, and manner the standard prescribes. On June 27, 2019, OSHA requested that Riverdale provide safety data sheets for all the chemicals used on its coating and galvanizing lines, the subject of OSHA's walk-around tour on that date. Riverdale did not respond until after OSHA reiterated its request in September 2019, well beyond the fifteen days the standard allows. In addition to being late, that response was incomplete, and as of the issuance of the citation, Riverdale continued to withhold relevant safety data sheets.

ARGUMENT

I. Standard of Review

This Court reviews the Commission’s factual findings under the substantial evidence standard. 29 U.S.C. § 660(a); *Fabi Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007); *Otis Elevator Co. v. Sec’y of Labor*, 762 F.3d 116, 120-21 (D.C. Cir. 2014). Where the Commission does not direct review of an ALJ’s decision, the ALJ’s findings become the Commission’s, and the substantial evidence standard “applies with undiminished force” to the ALJ’s findings. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 108 (1st Cir. 1997). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 619-20 (1966) (internal quotations omitted); *see also AJP Constr., Inc. v. Sec’y of Labor*, 357 F.3d 70, 73 (D.C. Cir. 2004); *see also Whirlpool Corp. v. OSHRC*, 645 F.2d 1096, 1101 (D.C. Cir. 1981). Under this standard, the Court “must uphold the Commission’s decision even if [the Court] would have reached a different result upon *de novo* review.” *Fabi*, 508 F.3d at 1081 (citing *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005)). The Commission’s legal determinations are only to be overturned if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A); *Fabi*, 508 F.3d at 1080. In addition, this Court must accept the

Commission’s credibility findings unless they are “patently unsupportable.” *Fabi*, 508 F.3d at 1081 (quotations and citations omitted).

II. Substantial Evidence Supports the ALJ’s Affirmance of the Three Cited Violations

To establish a violation of an occupational safety or health standard, the Secretary must show by a preponderance of evidence that “(1) the cited standard applies; (2) the employer failed to comply with the terms of the standard; (3) one or more employees had access to the cited condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition.” *Fla. Gas Contractors, Inc.*, 2019 CCH OSHD ¶ 33,709, 2019 WL 995716, at *2 (No.14-0948, Feb. 21, 2019) (citation omitted). A violation of a standard is serious if it “could eventuate in serious physical harm upon other than a freakish or utterly implausible occurrence of circumstances.” *Wal-Mart Stores, Inc. v. Sec’y of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005) (quoting *Brock v. L.R. Wilson & Sons, Inc.*, 773 F.2d 1377, 1388 (D.C. Cir. 1985)).

As explained in detail below, substantial evidence supports each of the affirmed citation items. First, the ALJ correctly found that Riverdale violated § 1910.147(c)(6)(i) because it did not provide a periodic inspection to its maintenance supervisor, an authorized employee who performed LOTO procedures in the spindle area. Second, the record proves that Riverdale violated § 1910.1200(h)(1) because the new employee training it provided to a coating line

machine operator did not cover the physical health hazards of chemicals used on the coating line or the measures available to protect against those hazards. Finally, the ALJ properly found that Riverdale did not respond to OSHA's request for safety data sheets in the time provided by the standard.

A. Maintenance Supervisor Borden Had Access to the Cited Condition because He Was Responsible for Performing LOTO in the Spindle Area but Never Received a Periodic Inspection as Required by § 1910.147(c)(6)(i)

The ALJ properly found that the Secretary had established each required element to prove a violation of § 1910.147(c)(6)(i). Vol. 22, Doc. 149 at 13. On appeal, the only element of the Secretary's prima facie case that Riverdale disputes is employee access (or exposure) to the violative condition. Pet'r's Br. at 11. Substantial evidence in the record establishes that maintenance supervisor Borden had access to the violative condition because he regularly performed LOTO in the spindle area – including on the Big Spindle on April 26, 2019 – but never received a periodic inspection to confirm his knowledge of the appropriate procedures.

To establish employee exposure to a hazard, the Secretary may show that employees “either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger.” *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 1976 WL 5933, at *3 (No. 504, 1976). Thus, in some cases Courts apply “[a]n ‘access’ test, as opposed to an ‘actual

exposure’ test’ when considering whether the Secretary has established the third element of his prima facie case. *See Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 811 (3d Cir. 1985) (collecting cases).

As explained below, the record supports the ALJ’s finding that Borden was actually exposed to the cited violation because he “applied LOTO to a spindle on the coating line on April 26, 2019.” Vol. 22, Doc. 149 at 12. But in any event, regardless of whether Borden was actually exposed on that date, Borden had access to the violative condition because his assigned maintenance duties included performing LOTO on the coating line spindles.

1. Borden Was Actually Exposed to the Cited Hazard Because He Performed LOTO on the Main Coating Line Spindle, or “Big Spindle”

The periodic inspections required by § 1910.147(c)(6)(i) protect an employee from being exposed to the hazard of maintaining or servicing equipment without knowledge of the procedures necessary to protect against the unexpected energization, start-up or release of stored energy. Employers must provide periodic inspections “to ensure that the procedure and the requirements of [the LOTO] standard are being followed.” 29 C.F.R. § 1910.147(c)(6)(i). Annual, periodic inspections serve “to correct any deviations or inadequacies identified” in the lockout and tagout energy control procedures used. 29 C.F.R. § 1910.147(c)(6)(i)(B). To accomplish this objective, an inspector

must be able to determine three things: first, whether the steps in the energy control procedure are being followed; second, whether the employees involved know their responsibilities under the procedure; and third, whether the procedure is adequate to provide the necessary protection, and what changes, if any, are needed. The inspector will need to observe and talk with the employees in order to make these determinations.

Control of Hazardous Energy Source (Lockout/Tagout), 54 Fed. Reg. 36644, 36673 (Sept. 1, 1989). Riverdale's written LOTO procedure incorporates the observation component of the periodic inspection by requiring employees to undergo a LOTO "Practical Demonstration." Vol. 10, R-57 at 13, 16.

The record shows that Borden was exposed to the cited condition because he actually performed LOTO without having received a periodic inspection. As recorded in Riverdale's LOTO log, Borden performed LOTO on "C-spindle," or coating line spindle, on April 26, 2019. Vol. 4, Tr. 834-836, 838-40; Vol. 9, C-16 at 4. Yet Borden testified that while at Riverdale, he never received a periodic inspection, or a practical demonstration. Vol. 4, Tr. 843, 864; Vol. 10, R-57 at 13. Riverdale's failure to produce a completed LOTO Demonstration Checklist for Borden corroborates his testimony that Riverdale failed to perform a periodic inspection (or indeed, any inspection). Vol. 4, Tr. 938, 940-41; *See MB Consultants, Ltd, d/b/a Murray's Chicken*, 25 OSHC 1146, 2014 WL 5825311, at *12 (Nos. 12-1165 & 12-1269, 2014) ("the absence of any written [inspection] certification ... is sufficient evidence from which to reasonably infer that the Respondent failed to conduct the inspection."). As the ALJ explained, "[w]ithout

conducting the required periodic inspections, the employer cannot ensure its authorized employees understand and will implement the appropriate LOTO procedures for the relevant equipment and machinery.” Vol. 22, Doc. 149 at 12; *see also* § 1910.147(c)(6)(i); 54 Fed. Reg. at 36673 (explaining that standard “will assure that employees follow and maintain proficiency in the energy control procedure”). Therefore, Borden was exposed to the violative condition because he performed LOTO on April 26, 2019, without having been observed as proficient in the procedures used. *See MB Consultants*, 2014 WL 5825311, at *12 (finding exposure to a violation of § 1910.147(c)(6) where employees implemented LOTO but the employer had not conducted the required review and inspection of the LOTO procedures applied).

Riverdale claims that Borden’s testimony and Riverdale’s LOTO log cannot establish employee exposure because neither conform to the specific facts noted in the citation’s violation description. Pet’r’s Br. at 12-14. The citation specifically charges Riverdale with having “not conducted a periodic inspection of Energy Control Procedure RMC-022 for the Big Spindle since 4/26/2016.” Vol. 12, Doc 2 at 7. Riverdale argues that the trial evidence only establishes that a LOTO procedure was performed on “C-Spindle,” not the “Big Spindle.” Pet’r’s Br. at 12-13. This argument is unpersuasive. First, as explained below, the record establishes that “C-Spindle” and the “Big Spindle” are the same equipment.

Second, the record establishes that Energy Control Procedure RMC-022 is used to lock out all spindles.

The evidence shows that “C-Spindle” is the “Big Spindle.” The spindle area contains three spindles, one big and two small. Vol. 4, Tr. 1015. Riverdale’s own documents refer to the different spindles using different names. The “Big Spindle” was also referred to as “Spindle 1” and the “Main Spindle.” Vol. 9, C-17 at 38, 42. The “Small Spindles” were also referred to as “Spindle 2” and “Spindle 3.” Vol. 9, C-17 at 35; Vol. C-16 at 8.

The arrangement of the spindle area demonstrates that when Borden discussed “C-Spindle” he was referring to the “Big Spindle.” The spindle area is the terminal point of the manufacturing process for Riverdale’s PVC coated mesh. Vol. 1, Tr. 87-88, 109-10, 116-17. There, the “Big Spindle” (“Spindle 1”) receives the mesh so it can be rolled and cut to the desired length. *Id.* The “Big Spindle” is the only spindle to receive mesh that has traveled continuously through the coating line. *See* Vol. 1, Tr. 116-17; Vol. 9, C-4 at 5a (annotated at trial). In contrast, the small spindles are set back from the remainder of the coating line and are not in continuous use. *See id.*



The “Big Spindle” (“Spindle 1”) shown from upstream in the manufacturing process, as mesh travels from the Main Drive to the spindle area. Vol. 9, C-40 (video still); see also Vol. 1, Tr. 116-17.



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The “Big Spindle” (“Spindle 1”) shown from downstream in the manufacturing process, as it receives mesh from the Main Drive. Vol. 9, C-4 at 5a (annotated at trial); see also Vol. 1, Tr. 109-110. Spindle 2 pictured in the foreground, is not in use. Id. Spindle 3 is not pictured.

This arrangement shows that while all spindles may be used in the manufacturing process, only the “Big Spindle” is directly and regularly receiving mesh from the coating line. Therefore, it is reasonable to infer that the “Big Spindle” would be interchangeably referred to as “C-Spindle.”

Further, Riverdale’s Lockout/Tagout Log also shows that when LOTO was performed on “Spindle 3,” it was explicitly identified as the “Small Spindle.” Vol. 9, C-16 at 8. That Borden did not include such a qualifier when recording LOTO on April 26, 2019, underscores that he was not performing LOTO on a Small Spindle. Accordingly, when Borden recorded LOTO for “C-Spindle,” the most obvious understanding is that he was referring to the primary spindle used on the coating line: the “Big Spindle.”¹⁰

Further, the evidence shows that the same LOTO procedure applied to all spindles, so when Borden performed LOTO on “C-Spindle” that necessarily included performing Energy Control Procedure RMC-022 for the Big Spindle.

¹⁰ The only other reasonable interpretation of Borden’s testimony is that “C-Spindle” referred to the entire spindle apparatus, including Spindles 1, 2, and 3. Even so, LOTO performed on the entire spindle area must necessarily include performing LOTO on the “Big Spindle” to prevent the unexpected energization, start up, or release of stored energy as work was being performed in the entire spindle area. Critically, there is no evidence in the record suggesting that performance of LOTO on the “C-Spindle” could only have referred to LOTO on a “Small Spindle” (and excluding the “Big Spindle).” Therefore, the ALJ’s finding on this issue is supported by substantial evidence.

During its inspection, OSHA requested *all* energy control procedures for each piece of equipment on the coating line, Vol. 9, C-14 at 2, including “the one for the spindle machine,” Vol. 9, C-9 at 3. In response, Riverdale provided a single LOTO procedure (RMC-022 for the Big Spindle) that was unique to “the spindle.”¹¹ Vol. 4, Tr. 842, 1014. This single responsive document indicates that Riverdale had only one LOTO procedure that applied to the spindle area as a whole and, therefore, to each of the individual spindles contained within it. Consequently, Borden was exposed to the violative condition when he performed LOTO procedure RMC-022 – a procedure for which he had not been inspected – on April 26, 2019.

Riverdale’s remaining argument, that there was no evidence that LOTO procedures were “actually required” on April 26, 2019, is also unsupported. The record establishes that Borden needed to perform LOTO to protect against hazards

¹¹ Riverdale misleadingly relies on compliance office (CO) Gryzowski’s testimony as evidence that different procedures existed for each of the three spindles in the spindle area. When asked at trial whether “the same procedure for the big spindle lockout can be used to lockout a different machine,” the CO responded, “there is multiple energy control procedures that were provided ... there were multiple ones and there was *a* unique one for *the* spindle.” Vol. 4, Tr. 1015 (emphasis added). When the CO’s testimony is considered alongside his document request for procedures relating to “*the* spindle machine,” Vol. 9, C-9 at 3, it is apparent that the CO understood the spindle area as a single machine for which a single LOTO procedure applied. *See* Vol. 4 at 1014-15; Vol. 9, C-9 at 3; Vol. 9, C-14 at 2. Thus, the CO’s response shows only that the procedure was different for machines outside the spindle area (such as those used for wash or coating procedures) and not between the individual spindles.

associated with the “Big Spindle.” Riverdale’s LOTO program advises that authorized employees like Borden must apply existing LOTO procedures when performing servicing or maintenance on pneumatic and electric sources of energy. Vol. 10, R-57 at 1, 3-4, 6. When performing maintenance work in the spindle area, Borden worked from Energy Control Procedure RMC-022, which advises of the hazards and energy sources associated with the “Big Spindle.” Vol. 4, Tr. 842, 1014. These include electrical and pneumatic (compressed air) energy sources and hazards, including “the quick disconnect for the couplings for the compressed air, which may contain debris, which could be released 100 psi.” Vol. 4, Tr. 842; *see also* Vol. 4, Tr. 1014. Thus, Riverdale’s own LOTO program and procedures identify maintenance work on the coating line spindles as requiring LOTO because of the associated electrical and pneumatic hazards present.

Considered together, the evidence shows that Borden was actually exposed to the cited condition. As required under Riverdale procedures, on April 26, 2019, Borden performed LOTO on “C-Spindle,” or the “Big Spindle,” to protect against the electric and pneumatic hazards associated with that equipment. Riverdale never conducted a periodic inspection of the procedure that Borden used. Therefore, Borden was exposed to the violation of § 1910.147(c)(6)(i) because he performed a LOTO procedure without having been assessed as proficient in that

procedure, creating a risk that the LOTO would be unsuccessful and that Borden would be injured from the quick disconnect of the spindle couplings.

2. Alternatively, It Was Reasonably Predictable That Borden Would Have Access to the Hazard Because He Was Responsible for LOTO of Machines on the Coating Line, Including the “Big Spindle”

Even if the record did not show that Borden performed Energy Control Procedure RMC-022 for the Big Spindle on April 26, 2019, Borden still had access to the violative condition because it was reasonably predicable that he would perform that specific procedure. To prove employee access, the Secretary need not show that any employee was actually exposed, but rather that it was reasonably predictable that some employee would come within the zone of danger, either by operational necessity or otherwise (including inadvertence). *See, e.g., Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1997 WL 694096, at *3 (No. 93-1853, 1997); *Am. Wrecking Corp. v. Sec’y of Labor*, 364 F.3d 321, 327 (D.C. Cir. 2004); *Donovan*, 766 F.2d at 811 (collecting cases). The “zone of danger” is the “area surrounding the violative condition that presents the danger to employees [that] the standard is intended to prevent.” *RGM Constr. Co.*, 17 BNA OSHC 1229, 1995 WL 242609 at *5 (No. 91-2107, 1995) (citing *Gilles & Cotting, Inc.*, 1976 WL 5933 at *3). In this case, the Secretary need only show that it was reasonably predicable that Borden would be performing Energy Control Procedure RMC-022 for the Big Spindle without having received the requisite periodic inspection to

confirm proficiency in that procedure. Any work done under these conditions would place Borden in the zone of danger due to the increased potential for the unexpected energization, start-up or release of stored energy.

It is incontrovertible that Borden's maintenance responsibilities included LOTO. Riverdale designated Borden as an authorized employee, and his regular maintenance responsibilities included applying LOTO procedures to perform service and maintenance on machines. Vol. 4, Tr. 831, 834; Vol. 5, Tr. 1184-85; Vol. 9, C-105 at 31. The "Big Spindle" presents electric and pneumatic hazards, and LOTO must be performed before any service or maintenance to prevent employee injury caused by the quick disconnect of couplings. *See* Vol. 4, Tr. 842; Vol. 10, R-57 at 1, 3-4, 6. Given this hazard, and Borden's specific role as a maintenance employee, it was reasonably predictable that Borden would perform Energy Control Procedure RMC-022 for the Big Spindle (or "Main Spindle") during his regular duties. Indeed, Borden testified that he had worked on the coating line spindle as far back as 1998. Vol. 4, Tr. 863. Because Borden had never been assessed as proficient in LOTO, any maintenance work performed on the "Big Spindle" would place him in the zone of danger presented by the spindle's unexpected energization, start up or release of stored energy.

Borden spent over ten years employed in Riverdale's maintenance department and, although applying LOTO was a regular component of his work, he

never once received a periodic inspection. Vol. 4, Tr. 828-29; 831, 834 843, 863-864. Riverdale was not unaware of the hazards associated with LOTO; it had a LOTO program and specific procedures for the various machines used. See Vol. 10, R-57. Without having received a periodic inspection from another authorized employee, Borden was at risk of performing incorrect LOTO procedures, including on the “Big Spindle.” For these reasons, Borden had access to the cited condition, and the ALJ properly affirmed the violation of § 1910.147(c)(6)(i).

B. The ALJ Properly Affirmed the Violation of § 1910.1200(h)(1) Because Riverdale Failed to Provide Training in Accordance with the Standard to a Machine Operator Working with Chemicals on the Coating Line

The ALJ correctly found that the Secretary had established a violation of § 1910.1200(h)(1). Vol. 22, Doc. 149 at 34. Riverdale contests two elements of the Secretary’s prima facie case on appeal: whether it violated the standard and whether it had knowledge of the violative condition. Pet’r’s Br. at 17-20. Riverdale also alleges that the ALJ improperly admitted the machine operator’s statement under Fed. R. Evid. 403. *Id.* at 15-17. Riverdale’s arguments lack merit. As explained below, Riverdale did not train the machine operator as required, despite knowledge of hazardous chemicals in his work area. Additionally, Riverdale failed to identify any unfair prejudice from the admission of the employee’s statement.

1. Riverdale Did Not Train Machine Operator Trinidad on the Health Hazards Associated with Coating Line Chemicals

The ALJ rightly found that Riverdale did not provide sufficient training on hazardous chemicals in violation of § 1910.1200(h)(1). The hazard communication standard requires that employers train employees about the hazardous chemicals that they may be exposed to under normal conditions of use or in a foreseeable emergency. 29 C.F.R. §§ 1910.1200(a)(1); 1910.1200(b)(1)-(2). The record contains substantial evidence showing that Riverdale did not train machine operator Luis Trinidad on chemicals in his work area. Trinidad regularly used chemicals in his work, including “soap,” the term employees used for sodium hydroxide. Vol. 5, Tr. 1078, 1080-81; Vol. 9, C-27 at 1-2. Trinidad explained that exposure to “soap,” would “eat my skin” but he did not know why. Vol. 9, C-27 at 1. Other Riverdale employees confirmed that “soap” caused dermal burns, Vol 3, Tr. 605; Vol. 6, Tr. 1372, and IH Hart identified “soap” as a corrosive chemical that can damage skin, eyes, and other body parts, Vol. 5, Tr. 1078. Trinidad’s signed interview statement to OSHA expressly states that he did not receive training about chemicals. Vol. 5, Tr. 1080; Vol. 9, C-27 at 1. Trinidad had been employed at Riverdale for two months at the time of his OSHA interview. Vol. 9, C-27 at 1. He had recently completed his new hire training and could specifically recount the topics covered, including particular machines and personal protective

equipment. *Id.* Trinidad also noted that he was shown a safety video but there was “[n]othing in [the] video about chemicals.” *Id.*

To rebut Trinidad’s statement, Riverdale produced several documents that allegedly show its compliance with the training requirements. Conspicuously missing from its production were the safety film and five-page document that Riverdale claims comprise its hazard communication training. Vol. 2, Tr. 486-87, 493-94; Vol. 7, Tr. 1531-32. The ALJ properly inferred from this missing evidence that the film and five-page document did not address the mandated subject matter. Vol. 22, Doc. 149 at 33 n. 20; *See N. Landing Line Constr. Co.*, 19 BNA 1465, 2001 WL 826759, at *10 (No. 96-721, 2001) (“[D]eficiencies in [the employer’s] response should be taken as establishing that there was no such evidence, not that the Secretary failed to carry her burden.”) (citing *Ocean Elec. Corp. v. Sec’y of Labor*, 594 F.2d 396, 403 n. 4 (4th Cir. 1979)).

The documents that Riverdale did produce do not show that Trinidad was trained in specific chemicals or categories of hazards, as § 1910.1200(h)(1) requires. *See* Vol. 22, Doc. 149 at 33. Although Riverdale claims that the Safety Training Checklist and Basic Employee Safety Responsibilities Test constitute “considerable documentary evidence” of Trinidad’s training, Pet’r’s Br. at 16, the critical point is that neither document addresses the specific training topics the standard requires. The Safety Training Checklist only notes that “Right to

Know/Hazard Communication” encompasses the “Location of safety data sheets and other reference material.” Vol. 10, R-106 at 1. Ensuring access to safety data sheets does not satisfy the full requirements of § 1910.1200(h). While the standard does mandate that employers provide this information to employees, § 1910.1200(h)(2)(iii), the training must cover several additional topics, including the hazards associated with chemicals in the work area and ways of detecting and protecting against such hazards, § 1910.1200(h)(3)(i)-(iii). The Safety Training Checklist does not, therefore, demonstrate that Riverdale covered the additional requirements for training on categories of hazards or specific hazardous chemicals. *See* § 1910.1200(h)(1). Similarly, Trinidad’s Basic Employee Safety Responsibilities Test only addresses hazard communication through its questions on safety data sheets and labeling chemical containers. Vol. 10, R-107 at 1. The fact that Trinidad knew that all chemicals should have a safety data sheet, and that containers of chemicals must be labeled, does not prove that he received the requisite training on, for example, “the physical, health, simple asphyxiation, combustible dust, and pyrophoric gas hazards ... of the chemicals in the work area.”¹² § 1910.1200(h)(3)(ii).

¹² The Secretary notes that the record also draws into question the effectiveness of Riverdale’s safety data sheet related information and training. Although Trinidad informed IH Hart that he had received a safety data sheet relating to “soap,” the document that he identified was not a safety data sheet. Vol. 5, Tr. 1081-2, Tr.

Petitioner's claim that Trinidad's knowledge about "soap's" effects and preventative personal protective equipment establishes that he received the requisite training is also unconvincing. Pet'r's Br. at 18. Trinidad's knowledge of the industry term for sodium hydroxide ("soap") is unsurprising, as he regularly worked with it on the coating line. *See* Vol. 9, C-27 at 1-2. As the ALJ observed, "[k]nowing what the other employees call sodium hydroxide ... does not establish Riverdale trained him in compliance with the standard." Vol. 22, Doc. 149 at 32. Likewise, Trinidad's knowledge of personal protective equipment and the treatment for dermal exposures is general information that may be obtained from routine encounters with the chemical. *See* Vol. 9, C-27 at 2. Alternatively, Trinidad could have received information about safety gloves during the daily walk-throughs that are conducted to ensure that workers are wearing proper personal protective equipment. *See* Vol. 6, Tr. 1326. As the ALJ aptly noted, none of the statements that Riverdale has pointed to counteract Trinidad's claim that he had not yet received training in the use of chemicals. Vol. 22, Doc. 149 at 32.

That Trinidad was unaware of the invisible harms caused by PVC further shows that Trinidad's knowledge of "soap's" hazards came from literal hands-on experience. Trinidad stated that PVC, a chemical used on the coating line, "is

1082-83 (under seal); Vol. 9, C-27 at 1; Vol. 11, C-28 (under seal). Rather, it was a recipe for a coating line product that included the chemical. Vol. 5, Tr. 1082; Vol. 11, C-28 (under seal).

harmless.” Vol. 9, C-27. But PVC has the potential to be a carcinogen, a specific category of hazard for which § 1910.1200(h)(1) requires training. Vol. 5, Tr. 1081. Unlike the dermal burns that an employee would experience when working with “soap,” PVC’s hazardous health effects are not apparent through regular contact with the chemical. Thus, Trinidad’s belief that the PVC is “harmless” underscores the fact that Riverdale’s training did not sufficiently apprise him of chemical hazards on the coating line.

The ALJ properly credited Trinidad’s comments about his lack of chemical hazard training. And the evidence that Riverdale has produced in response does not contradict the machine operator’s statement that he was not trained on chemicals. Substantial evidence therefore establishes that Riverdale violated its training obligations under § 1910.1200(h)(1).

2. Riverdale Informed OSHA of the Hazardous Chemicals Used on the Coating Line, and Therefore Had Knowledge of the Hazards in Trinidad’s Work Area

The ALJ likewise properly found that Riverdale knew of its failure to adequately train employees under the hazard communication standard. Employer knowledge of the violative condition “will almost invariably be present where the alleged violative condition is inadequate training of employees.” *Compass Evn’t, Inc. v. OSHRC*, 663 F.3d 1164, 1168 (10th Cir. 2011) (citing *Andrew Elec. Co.*, 22 BNA OSHC 1593, 2009 WL 565081, at *3 (No. 08-0103, 2009) (ALJ); *Lane*

Constr. Corp., 23 BNA OSHC 1097, 2009 WL 5635347, at *5 (No. 09-0348) (ALJ)). Riverdale’s employee handbook declares that employees “will be trained in safety procedures on a one-on-one basis by the Supervisor.” Vol. 9, C-9 at 56. The company’s hazard communication program further delineates the specific training that employees must receive. This includes training on “any operations in their work area where hazardous chemicals are present;” “physical health hazards of the chemicals in their work area;” and “specific procedures the employer has implemented to prevent exposure to hazardous chemicals.” Vol. 10, R-80 at 2. As explained above, the record establishes that Riverdale did not provide Trinidad with one-on-one training on the specific topics under the hazard communication standard or outlined in the company’s own hazard communication program. *Supra*, Section B.1. Therefore, Riverdale is necessarily aware of the violative condition.

Riverdale argues that the knowledge element has not been met because the ALJ made “no finding that [Riverdale] had actual or constructive knowledge that Trinidad’s job duties would require him to be exposed to the ‘soap’ – or that his exposure was reasonably predictable.” Pet’r’s Br. at 19. But this argument misstates the standard’s requirement for when training is required. The standard’s training requirement is broader than Petitioner presents. Section 1910.1200(h)(1) requires that employers provide “employees with effective information and

training on hazardous chemicals in *their work area.*” (emphasis added). Under the standard, “[w]ork area means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.” § 1910.1200(c). Trinidad worked as a machine operator on the coating line; accordingly, the coating line was his work area. Employer knowledge is thus established by showing that Riverdale was aware of chemicals used on the coating line. Trinidad’s specific job duties are not relevant.¹³

The record plainly shows that Riverdale had knowledge of hazardous chemicals in Trinidad’s work area. Riverdale disclosed the chemicals used on the coating line during IH Hart’s walk-around inspection. Knott informed IH Hart that Riverdale used Chemical 5 in its hot water wash. Vol. 5, Tr. 1066 (under seal), 1078, 1124-25; Vol. 9, C-25 at 5 (under seal). Knott also identified an in-house

¹³ Nevertheless, Trinidad’s own statement demonstrates that his job functions included working with hazardous chemicals. In explaining his role at Riverdale, Trinidad explained that “I check the machines ... the washers. [Four] compartments w[ith] soap and water ... I use primer, soap, fluid colors.” Vol. 9, C-27 at 1. Regarding “soap,” Trinidad added “we have to check it, and if it needs more, I add it.” Vol. 9, C-27 at 2. Thus, Trinidad’s role required that he routinely use hazardous chemicals for which he had not received training.

Furthermore, Riverdale must necessarily have knowledge of Trinidad's job duties. Riverdale’s employee handbook advises that a supervisor’s role is to explain duties and ensure an employee’s understanding. Vol. 9, C-9 at 14. Riverdale also drafts job descriptions laying out specific roles. *See, e.g.*, Vol. 9, C-43. Trinidad articulated his specific job tasks to IH Hart, and it is nonsensical to suggest that he engaged in these activities solely of his own volition. *See* Vol. 9, C-27 at 1-2.

primer as a product used on the coating line. Vol. 5, Tr. 1067. Employer provided instructions for mixing both the hot water wash and primer showed that they contained hazardous Chemicals 4, 5, and 6. Vol. 11, C-28 (under seal), C-29 at 1 (under seal), C-31 at 2, 62, 88 (under seal). In addition to Knott, Production Lead Adam Minter, and Lead Coating Line Operator Joshua Romer, testified that “soap” and primer were in use on the coating line. Vol. 1, Tr. 85, 215; Vol. 3, Tr. 600, 605. This testimony corroborates Trinidad’s own statement that he encountered “soap” and primer in his work area. Vol. 9, C-27. Considered together, this evidence proves that Riverdale was aware of Trinidad’s exposure to hazardous chemicals because such chemicals were in use on the coating line. Riverdale, therefore, also had knowledge of the violative condition because the company did not train Trinidad on the hazards associated with these chemicals.

3. The ALJ Properly Admitted Trinidad’s Statement Because It Did Not Create a Danger of Unfair Prejudice

It was appropriate for the ALJ to admit Trinidad’s non-hearsay statement because it was highly probative and did not impose unfair prejudice.¹⁴ Federal

¹⁴ Riverdale mischaracterizes Trinidad’s statement as “hearsay” throughout its brief – this is incorrect. *See* Pet’r’s Br. at 1, 8, 10. The ALJ properly held, and Riverdale does not appeal, that Trinidad’s statement was a non-hearsay statement under Fed. R. Evid. 801(d)(2)(D) because it was a statement offered against an opposing party and that was made by the party’s employee on a matter within the scope of the employment relationship while it existed. Vol. 22, Doc. 149 at 31.

Rule of Evidence 403 “focuses on the ‘danger of *unfair* prejudice’ and gives the court discretion to exclude evidence only if that danger ‘*substantially* outweighs’ the evidence’s probative value.” *U.S. v. Gartmon*, 146 F.3d 1015, 1021 (D.C. Cir. 1998) (quoting Fed. R. Evid. 403) (emphasis in original). “The emphasis on unfair prejudice ... is not an idle formality.” *In re PHC, Inc. Shareholder Litigation*, 894 F.3d 419, 440 (1st Cir. 2018) (internal quotations and citations omitted). “After all, virtually all evidence is meant to be prejudicial.” *Id.* This Court treats “Rule 403 determinations with great deference, reversing only for grave abuse of discretion.” *Bowie v. Maddox*, 642 F.3d 1122, 1135 (D.C. Cir. 2011) (quoting *Stevenson v. D.C. Metro. Police Dep’t*, 248 F.3d 1187, 1191 (D.C. Cir. 2001)).

The ALJ acted well within her discretion in admitting Trinidad’s statement. The machine operator’s disclosures were highly probative, as they explicitly addressed Riverdale’s failure to provide necessary training on hazardous chemicals. *See* Vol. 9, C-27. The circumstances of Trinidad’s interview demonstrate his statement’s reliability. IH Hart drafted the statement synchronously, and Trinidad immediately reviewed it for accuracy. Vol. 5, 1072-74. Notably, Riverdale’s General Counsel was present for the entire interview even though OSHA’s customary practice is to interview employees privately. Vol. 5, 1070-72, 1077-78; Vol. 9, C-27 at 1; *see also* 29 U.S.C. § 657(a)(2) (authorizing the Secretary to “question privately any such ... employee” during an inspection).

The presence of his employer surely created a disincentive for Trinidad to speak falsely or unflatteringly, underscoring the reliability of his assertions.

Riverdale has not identified any *unfair* prejudice suffered from the admission of Trinidad's statement. The arguments articulated in Petitioner's brief merely describe the typical effects inherent in an opposing party's evidence. *See Robertson v. McCloskey*, 680 F. Supp. 412, 413 (D.D.C. 1988) (noting "if ... the presence of contradictory evidence were a sufficient basis for excluding testimony, few witnesses would survive a motion in limine"). Thus, the ALJ properly admitted the statement under Rule 403.

C. The ALJ Properly Affirmed the Violation of § 1910.1200(g)(11) Because Riverdale Did Not Respond to OSHA's Request for All Safety Data Sheets within the Mandated Fifteen Days

The ALJ correctly found that the Secretary had established an other-than-serious violation of § 1910.1200(g)(11), the recordkeeping violation. Vol. 22, Doc. 149 at 38. On appeal, Riverdale only challenges whether it complied with the terms of the standard. Substantial evidence in the record establishes that Riverdale failed to provide requested safety data sheets in the time required by the standard.

Section 1910.1200(g)(11) instructs employers to respond to requests in accordance with § 1910.1020(e), specifically to "assure that access is provided in a reasonable time, place, and manner." § 1910.1020(e)(1)(i). Furthermore, "[i]f the employer cannot reasonably provide access to the record in fifteen (15) working

days, the employer shall within the fifteen (15) working days apprise” the requester of the reason. *Id.* Riverdale’s claim that “[t]he cited standard does not have any time limitation” is therefore incorrect. Under § 1910.1020(e), the “reasonable time” allotted for the employer’s response is clear: fifteen days.

Riverdale waited until just under ninety days before partially responding to the Secretary’s request. IH Hart’s initial safety data sheet request was made on June 27, 2019, during the second inspection’s opening conference. Vol. 5, Tr. 1056-58; Vol. 9, C-26 at 1. IH Hart made the request directly to Riverdale owner Knott and General Counsel Means and provided her contact information. Vol. 5, Tr. 1057-59. Riverdale did not contact IH Hart about the safety data sheets between the June opening conference and the September closing conference. Vol. 5, Tr. 1088. Riverdale neither provided IH Hart access nor apprised her of any delays, as § 1910.1020(e) requires. After IH Hart raised her outstanding request at the September closing conference, Riverdale’s counsel e-mailed IH Hart several of the requested safety data sheets, including those for Chemicals 4, 5, and 6. Vol. 5, Tr. 1088-90, Tr. 1090-94 (under seal); Vol. 9, C-31 at 2-8, 61-73, 88-92 (under seal). However, this response did not include all safety data sheets for chemicals used on the coating and galvanizing lines, as OSHA requested. Vol. 5, Tr. 1094 (under seal). As of the citation’s issuance on December 13, 2019, Riverdale still had not provided safety data sheets for Chemicals 2 and 3. *Id.*

IH Hart's safety data sheet request was broad but clear. As recorded on the written document request, IH Hart specifically asked for "any not already provided." Vol. 9, C-26 at 1. This general request contrasted with the targeted request for air sampling data, which was limited only to the "area of the complaint."¹⁵ *Id.* After providing Riverdale with the written request, IH Hart toured the coating and galvanizing lines, spoke with Knott about the specific chemicals used, and photographed chemical containers, demonstrating that her inspection encompassed all hazardous chemicals in use. Vol. 5, Tr. 1063-64 (under seal), 1065-66 (under seal). IH Hart reiterated her comprehensive request at the September closing conference. There, IH Hart discussed the second citation items, which included missing safety data sheets for the coating and galvanizing lines. Vol. 5, Tr. 1088-89. IH Hart offered Riverdale the opportunity to abate the violations, *Id.*, and Riverdale provided OSHA with several safety data sheets after this conference, Vol. 11, C-31 at 1 (under seal). However, the safety data sheets subsequently sent, while including the specific chemicals identified in the citation, were sent well beyond the time the standard allows and did not cover all the hazardous chemicals used on the galvanizing and coating lines. Vol. 5, Tr. 1094.

¹⁵ Moreover, even if IH Hart had narrowed her safety data sheet request to the area of the complaint, it still would encompass chemicals used on the coating and galvanizing lines, as the April complaint that initiated IH Hart's investigation expressed concerns about "powder coating and galvanizing chemicals." Vol. 10, R-47.

Riverdale claims that the company did not know that IH Hart sought safety data sheets for the coating and galvanizing lines until the closing conference. Pet'r's Br. at 22, 24. But as the ALJ noted, "Riverdale's argument would be more persuasive if one of the men attending the opening conference or walkaround inspection had testified" to this. Vol. 22, Doc. 149 at 36. Although Riverdale claims that such testimony was not necessary because IH Hart never explicitly testified to the company's understanding of her request, her testimony sufficiently put Riverdale on notice that a rebuttal was needed. As discussed above, the context in which the request was made shows that IH Hart was seeking information for all chemicals in use on the coating and galvanizing lines. IH Hart confirmed that Riverdale never sought clarification during her visit, even though she and Knott discussed hazardous chemicals that were not air contaminants. Vol. 5, Tr. 1058, 1063-64 (under seal), 1065-66 (under seal), 1125. When asked why she annotated the written safety data request as covering "any not already provided," IH Hart explained that she believed that Riverdale may have already provided safety data sheets to the safety inspector (at the first investigation).¹⁶ Vol. 5 at

¹⁶ As an alternative explanation for IH Hart's qualified request, Riverdale claims that Riverdale "had already provided several SDSs to OSHA before [the health] inspection began." Pet'r's Br. at 21. Petitioner does not cite to any evidence in support of this assertion. *Id.* And even if some SDSs had been provided, the record shows that Riverdale never provided SDSs for all galvanizing and coating line chemicals, as requested.

1058. The first OSHA investigation, of which Means and Knott were aware, concerned the April degloving injury, an incident that did not concern air contaminant hazards. Vol. 4 at 871, 885; Vol. 5 at 1058. IH Hart's testimony demonstrates her belief that her safety data sheet request was unambiguous.

Given this testimony, the ALJ properly applied an adverse inference against Riverdale for its failure to call Means as a witness. Vol. 22, Doc. 149 at 36-37. Means was present during IH Hart's testimony and could easily assess whether his own understanding of the safety data sheet request was consistent with IH Hart's account. As the ALJ explained, "[i]f [Means] disagreed with IH Hart's testimony, he could have informed Riverdale's counsel, who could have called Means or Knott to the stand to rebut." Vol. 22, Doc. 149 at 36. His failure to do so lends weight to IH Hart's testimony that her request included all chemicals on the coating and galvanizing lines. *See Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 2003 WL 22020485 at *12 (No. 00-1968, 2003) ("It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party.").

Riverdale failed to respond to OSHA's safety data sheet request within fifteen days. Substantial evidence in the record indicates that Riverdale understood OSHA's safety data sheet request as applying to all chemicals on the coating and

galvanizing lines, and that its failure to respond was not based on a misunderstanding. Crucially, the record plainly shows that at the time of the citation's issuance, Riverdale still had not provided all safety data sheets requested. Vol. 5, Tr. 1094 (under seal). Therefore, even if Riverdale did not know that IH Hart sought safety data sheets for the coating and galvanizing lines until the September closing conference, Riverdale still did not timely respond to that request within fifteen days. When OSHA issued the December 2019 citation, Riverdale had only provided some safety data sheets. Vol. 5, Tr. 1089; Vol. 9, C-31 (under seal). Contrary to Riverdale's claim that all sheets were provided, OSHA never received the requested safety data sheets for Chemicals 2 and 3, which were used on the coating and galvanizing lines. Vol. 5, Tr. 1094 (under seal), 1125; *see also* Vol. 5, Tr. 1063-66 (under seal); Vol. 9, C-31 (under seal). For these reasons, the ALJ's conclusion that Riverdale violated § 1910.1200(g)(11) is supported by substantial evidence.

CONCLUSION

For the foregoing reasons, this Court should deny Riverdale's petition for review and affirm the final order of the Commission.

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Secretary of Labor's Brief contains 11,764 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The font used was Times New Roman 14-point proportional spaced type. This Brief was prepared using Microsoft Word 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2023, I served the foregoing Brief for Appellee U.S. Secretary of Labor, via the Court's electronic-filing system on all parties of record, including the following attorney for Riverdale Mills Corporation:

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